No. 09-1188

In the Supreme Court of the United States

FRANK A. SKINNER, PETITIONER

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was required to successfully challenge a Bureau of Prisons disciplinary hearing through an action in habeas corpus before filing a civil damages claim under the Privacy Act, 5 U.S.C. 552a, where recovery for petitioner's alleged disciplinary harms unrelated to the duration of his sentence depended on overturning the adverse determination that also led to the loss of his good-time credits.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 13

TABLE OF AUTHORITIES

Cases:

Edwards v. *Balisok*, 520 U.S. 641 (1997) 7, 9, 10
Evans v. *McBride*, 94 F.3d 1062 (7th Cir. 1996), cert. denied, 519 U.S. 1131 (1997) 11
Gotcher v. *Wood*, 122 F.3d 39 (9th Cir. 1997) 12
Gwin v. *Snow*, 870 F.2d 616 (11th Cir. 1989) 11
Heck v. *Humphrey*, 512 U.S. 477 (1994) 6, 7, 9, 10
Montgomery v. *Anderson*, 262 F.3d 641 (7th Cir. 2001) 11, 12
Muhammad v. *Close*, 540 U.S. 749 (2004) 5, 7
Peralta v. *Vasquez*, 467 F.3d 98 (2006), cert. denied, 551 U.S. 1145 (2007) 12
Post v. *Gilmore*, 111 F.3d 556 (7th Cir. 1997) 12
Preiser v. *Rodriguez*, 411 U.S. 475 (1973) 6, 9
Razzoli v. *Federal Bureau of Prisons*, 230 F.3d 371 (D.C. Cir. 2000) 5, 8, 9
Sheldon v. *Hundley*, 83 F.3d 231 (8th Cir. 1996) 12
Uboh v. *Reno*, 141 F.3d 1000 (11th Cir. 1998) 11
Viens v. *Daniels*, 871 F.2d 1328 (7th Cir. 1989) 11
White v. *United States Probation Office*, 148 F.3d 1124 (D.C. Cir. 1998) 4

Cases—Continued: Page

Wilkinson v. *Dotson*, 544 U.S. 74 (2005) 7
Wolff v. *McDonnell*, 418 U.S. 539 (1974) 9

Statutes, regulations and rules:

Freedom of Information Act, 5 U.S.C. 552 2
Privacy Act :
5 U.S.C. 552a 2
5 U.S.C. 552a(d) 4
5 U.S.C. 552(a)(d)(2) 4
5 U.S.C. 552a(e)(5) 4, 5
5 U.S.C. 552a(g)(1)(C) 5
5 U.S.C. 552a(g)(4) 4
5 U.S.C. 552a(g)(4)(A) 5
28 U.S.C. 2254 6
42 U.S.C. 1983 ..... 6, 7
Fed. R. Civ. P. 60(b) 4

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 584 F.3d 1093. The opinion of the district court (Pet. App. 19a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2009. A petition for rehearing was denied on December 30, 2009 (Pet. App. 40a-41a). The petition for a writ of certiorari was filed on March 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a federal prisoner housed at a Bureau of Prisons (Bureau) facility in Atlanta, Georgia. Staff at that facility found a white powder in petitioner's cell

that tested positive for cocaine. After a disciplinary hearing, the Bureau imposed various sanctions, including the loss of 40 days of good time credit. Petitioner subsequently filed a complaint in the United States District Court for the District of Columbia seeking damages under the Privacy Act, 5 U.S.C. 552a. The district court dismissed petitioner's action, Pet. App. 19a-24a, and subsequently denied petitioner's motion for relief from the judgment, *id.* at 25a-29a, 30a-39a. The court of appeals affirmed. *Id.* at 1a-18a.

1. On November 27, 2001, Bureau staff searched petitioner's prison cell and found a white powder that tested positive for cocaine. On January 28, 2002, the Bureau conducted an internal disciplinary hearing. At the hearing, petitioner testified that the substance found in his cell was "[T]ide washing powder," which the hearing officer noted in his report. Pet. App. 2a-3a (brackets in original). The officer found, however, that petitioner had possessed cocaine, and the officer imposed sanctions that included the loss of 40 days of good time credit, 60 days of disciplinary segregation, the denial of commissary privileges for 180 days, and the denial of visitation rights for a year. *Id.* at 3a. The Bureau also referred the matter to the Federal Bureau of Investigation (FBI), which declined to prosecute because the case would not result in greater penal consequences than the sanctions already imposed by the Bureau. *Ibid.*

On July 8, 2002, petitioner filed a request with the FBI for information under the Freedom of Information Act, 5 U.S.C. 552. The FBI informed petitioner that its records contained 18 pages that were responsive to his request. Because the documents had originated with the Bureau, the FBI forwarded petitioner's request to the Bureau, which released the documents to petitioner.

One of the documents was the referral form that the Bureau had sent to the FBI. The form contained a typed paragraph stating that chemical tests conducted by the Bureau indicated that the white powder in petitioner's locker was cocaine. Below that paragraph was a handwritten notation: "Actually laundry detergent." The notation was unsigned, undated, and uninitialed. No evidence revealed who made the notation or what it meant. Petitioner acknowledged that the powder had not been sent to the FBI for testing, but nevertheless alleged that the notation reflected the results of an "independ[e]nt analysis" of the powder performed by the FBI. Pet. App. 3a-4a (brackets in original).

2. On August 13, 2004, petitioner filed a complaint in the United States District Court for the District of Columbia. He alleged that the powder found in his locker was laundry detergent rather than cocaine, that the FBI referral form indicated as much, and that the Bureau's records were therefore inaccurate. He requested two remedies under the Privacy Act: amendment of his inmate records and money damages for the sanctions imposed by the Bureau. Pet. App. 4a.

The Bureau moved to dismiss petitioner's complaint for failure to state a claim; in the alternative, it moved for summary judgment. First, the Bureau argued that it had exempted inmate records from the relevant provisions of the Privacy Act. Second, it maintained that petitioner had failed to exhaust administrative remedies seeking amendment of his inmate records. Third, the Bureau offered a "third and independent ground for dismissal" in a footnote: namely, that because success on petitioner's claims would result in the restoration of good time credit, his claims could only be brought in a habeas corpus action. Pet. App. 3a n.1, 4a-5a.

On June 20, 2005, the district court dismissed petitioner's complaint on the first of those grounds, *i.e.*, that petitioner's records were exempt from the relevant provisions of the Privacy Act. Pet. App. 19a-24a. Petitioner appealed but he also filed a motion for relief from the judgment under Federal Rule of Civil Procedure 60(b) in the district court. The court of appeals therefore held petitioner's appeal in abeyance pending disposition of the Rule 60(b) motion. On March 31, 2008, the district court denied the motion for relief from the judgment. Pet. App. 30a-39a.

3. The court of appeals affirmed. Pet. App. 1a-18a.

a. With respect to petitioner's claim for amendment of his records, the court of appeals agreed with the district court's analysis. Pet. App. 6a-7a. Section 552a(e)(5) of the Privacy Act requires agencies to maintain records used "in making any determination about any individual * * * with such accuracy * * * as is reasonably necessary to assure fairness to the individual in the determination." In addition, Section 552a(d) of the Act requires agencies to entertain requests for amendment of records that are inaccurate. 5 U.S.C. 552a(d)(2). As the court of appeals recognized, however, the Bureau has exempted inmate records from the requirements of Section 552a(d). Pet. App. 7a; see *White* v. *United States Probation Office*, 148 F.3d 1124, 1125 (D.C. Cir. 1998). Petitioner does not challenge that holding before this Court.

b. With respect to petitioner's claim from money damages, the court of appeals affirmed on a ground that the district court had not considered. Pet. App. 8a-9a. Section 552a(g)(4) of the Privacy Act permits liability against the United States for "actual damages sustained by the individual as a result of" an agency's "intentional

or willful" failure to maintain accurate records. 5 U.S.C. 552a(g)(4)(A); see 5 U.S.C. 552a(g)(1)(C) (creating private right of action). On August 9, 2002, the Bureau exempted inmate records from the record-maintenance requirements of Section 552a(e)(5)—which was before petitioner filed suit but after his disciplinary hearing. Pet. App. 9a. The court of appeals found it unnecessary to resolve whether the Bureau's exemption from Section 552a(e)(5) would apply in this case, because it affirmed the district court's decision on an alternative ground. *Ibid.*

Specifically, the court of appeals held that petitioner's "civil damages claim is barred unless and until he successfully challenges the disciplinary hearing on which it is based through an action in habeas corpus." Pet. App. 9a. After discussing in detail this Court's and its own precedents on when a prisoner may maintain a damages claim before having overturned the prison action in habeas, the court of appeals observed that "[i]f success in a 'damages action would implicitly question the validity of conviction or duration of sentence, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence.'" *Id.* at 11a (quoting *Muhammad* v. *Close*, 540 U.S. 749, 751 (2004)). The court reasoned that if petitioner "were to succeed in demonstrating that [the Bureau] intentionally or willfully maintained and acted upon a false record of drug possession, 'plainly the recision of good time would have to be overturned, thus accelerating [petitioner's] release.'" *Id.* at 13a (quoting *Razzoli* v. *Federal Bureau of Prisons*, 230 F.3d 371, 374 (D.C. Cir. 2000)). Because petitioner's recovery of damages would necessarily require reinstatement of his good time credit, the court

held that petitioner must proceed in habeas. *Id.* at 14a-16a.

ARGUMENT

The court of appeals held that because success on petitioner's damages claim would necessarily require the restoration of lost good time credit, petitioner must proceed in habeas. Petitioner claims (Pet. 10-28) that the court of appeals' decision is "in [t]ension" with decisions of this Court, Pet. 18, and in conflict with decisions of other courts of appeals. Those claims lack merit, and further review is not warranted.

1. a. As the court of appeals explained, this Court's precedents establish that petitioner is required to proceed in habeas. Pet. App. 9a-12a. In *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973), state prisoners sought injunctive relief under 42 U.S.C. 1983 to restore good-time credits that had been lost in prison disciplinary proceedings. 411 U.S. at 476. This Court held that a state prisoner seeking such relief may not proceed under Section 1983, but may seek relief in federal court only by a petition for habeas corpus under 28 U.S.C. 2254. *Preiser*, 411 U.S. at 490, 500. *Preiser* thus established that Section 1983 may be used to challenge conditions of confinement, but not to challenge the fact or duration of confinement.

In *Heck* v. *Humphrey*, 512 U.S. 477 (1994), the Court again considered the intersection between Section 1983 and habeas corpus. In that case, a state prisoner sought damages, but not equitable relief, under Section 1983 for an allegedly unconstitutional criminal conviction. *Id.* at 479. The Court reasoned that when "establishing the basis for the damages claim necessarily demonstrates the invalidity of the conviction[,] * * * the claimant

can be said to be 'attacking . . . the fact or length of . . . confinement.'" *Id.* at 481-482 (quoting *Preiser*, 411 U.S. at 490). The Court therefore held that habeas corpus is the appropriate vehicle when "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." *Id.* at 487.

In *Edwards* v. *Balisok*, 520 U.S. 641 (1997), the Court held that the *Heck* rule applies not only to convictions but also to prison disciplinary proceedings affecting the duration of confinement. In *Balisok*, a state prisoner brought suit under Section 1983 to challenge a disciplinary hearing that had resulted in multiple sanctions, including the loss of good time credit. *Id.* at 643. The prisoner challenged only the procedures used in the disciplinary hearing and sought only damages and prospective injunctive relief but not restoration of the lost credit. *Id.* at 643-645. This Court nevertheless held that because "[t]he principal procedural defect complained of by [the prisoner] would, if established, necessarily imply the invalidity of the deprivation of his good-time credits," the inmate's claim for money damages was not cognizable under Section 1983. *Id.* at 646; see *id.* at 648.

The court of appeals recognized that in light of the *Preiser-Heck-Balisok* trilogy of cases, a state prisoner's civil action "is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson* v. *Dotson*, 544 U.S. 74, 81-82 (2005); see *Muhammad* v. *Close*, 540 U.S. 749, 751 (2004) ("[W]here success in a prisoner's § 1983 damages action would implicitly question the validity of conviction or duration of sentence,

the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence.").

Petitioner correctly notes (Pet. 23-25, 27) that *Preiser*, *Heck*, and *Balisok* involved state prisoners, and that the District of Columbia Circuit has applied different habeas-channeling standards to state and federal prisoners: a state prisoner must proceed in habeas if success on his damages claim would necessarily affect the fact or duration of his confinement, while a federal prisoner must proceed in habeas if success on his damages claim would have a probabilistic impact on the fact or duration of his confinement. See *Razzoli* v. *Federal Bureau of Prisons*, 230 F.3d 371, 373-375 (D.C. Cir. 2000). But that differential treatment is irrelevant in this case, because petitioner must proceed in habeas under either standard. Indeed, the court of appeals expressly declined to rely on the lower probabilistic standard for federal prisoners. Pet. App. 16a n.7 ("This aspect of *Razzoli* is not relevant here because * * * [petitioner's] success in a damages action would necessarily imply the invalidity of the revocation of his good-time credits."). What matters in this case is that petitioner's challenge to his prison disciplinary hearing necessarily implies the invalidity of his deprivation of good time credits.

b. The court of appeals correctly applied that rule to the facts of this case. If petitioner were successful in demonstrating that the Bureau intentionally or willfully maintained and acted upon a false record of drug possession, it would necessarily imply the invalidity of the sanctions for that drug possession, including petitioner's loss of good time credit. See *Razzoli*, 230 F.3d at 374 ("If BOP knowingly preserved and acted upon a totally

invented record of drug possession, plainly the recision of good time would have to be overturned, thus accelerating Razzoli's release."); *id.* at 376 (affirming the dismissal of a similar Privacy Act claim and instructing the prisoner that he could refile the claim only if he were "successful in overturning [the Bureau's] actions through a petition for habeas"). As the court of appeals held, petitioner's "claim for damages under the Privacy Act is virtually indistinguishable from the claims barred in *Balisok* and *Razzoli*," Pet. App. 13a, and as in those cases, petitioner must first bring his claim in habeas.

2. Petitioner incorrectly argues (Pet. 18-24) that the decision below is at odds with this Court's precedents. Petitioner first cites (Pet. 18-19) a footnote from *Preiser* in which this Court suggested that a prisoner could simultaneously litigate civil claims relating to the conditions of confinement and habeas claims relating to the duration of confinement. See 411 U.S. at 499 n.14. But as petitioner acknowledges (Pet. 19), that dictum from *Preiser* predates both *Heck* and *Balisok*. In those cases, this Court squarely held that absent *prior* invalidation of a disciplinary hearing, a prisoner's civil action is barred if success in that action would necessarily demonstrate the invalidity of the fact or duration of the prisoner's confinement. See *Heck*, 512 U.S. at 487; *Balisok*, 520 U.S. at 646, 648.

Petitioner next claims (Pet. 19-21) that the decision below is in tension with *Wolff* v. *McDonnell*, 418 U.S. 539 (1974). In *Wolff*, this Court permitted state prisoners to challenge under Section 1983 the procedures by which they had been deprived of good time credits. *Id.* at 554-555. But as petitioner again acknowledges (Pet. 20-21), this Court explained in *Heck* and *Balisok* that "the claim at issue in *Wolff* did not call into question the

lawfulness of the plaintiff's continuing confinement." *Balisok*, 520 U.S. at 646 (quoting *Heck*, 512 U.S. at 482-483); *ibid.* ("Nor is there any indication in the [*Wolff*] opinion, or any reason to believe, that using the wrong procedures necessarily vitiated the denial of good-time credits.") (quoting *Heck*, 512 U.S. at 482-483 and adding emphasis).

Petitioner argues that this case is akin to *Wolff*, because he challenges the procedures by which "prison staff intentionally excluded the referral form from the records presented to the hearing officer." Pet. 22. As a threshold matter, the factbound question of whether the court of appeals "misread[]" the allegations in petitioner's complaint does not merit this Court's attention. Pet. 21. In any event, the court of appeals correctly rejected this argument: if petitioner were to show that prison officials had deliberately withheld the referral form, that would necessarily imply the invalidity of the sanctions imposed at the disciplinary hearing, including the deprivation of petitioner's good time credit. Pet. App. 13a, 15a-16a.

Petitioner also contends (Pet. 12-13) that he need not proceed in habeas because, although his disciplinary hearing resulted in the loss of good time credits, it also resulted in other sanctions that do not affect the duration of his confinement. But as the court of appeals explained, that fact—which was equally true in *Balisok* and *Razzoli*—is irrelevant. Because petitioner's non-durational sanctions resulted "from the same finding of guilt at the same hearing on the basis of" "the same 'Incorrect Information' in his file," Pet. App. 14a, success in challenging any of those sanctions "would 'necessarily imply the invalidity of the deprivation of his good-time

credits' as well," *id.* at 15a-16a (quoting *Balisok*, 520 U.S. at 646-647).

3. Petitioner argues (Pet. 10-18) that the decision below is in conflict with decisions of other courts of appeals, but he overstates the extent of the conflict. Petitioner claims (Pet. 15-17) that the Seventh and Eleventh Circuits—in *Viens* v. *Daniels*, 871 F.2d 1328 (1989), and *Gwin* v. *Snow*, 870 F.2d 616 (1989), respectively—authorized civil challenges to non-durational sanctions resulting from disciplinary proceedings that also led to the revocation of good-time credits. Both *Viens* and *Gwin*, however, were decided well before *Heck* and *Balisok*. In light of this Court's intervening case law, the Seventh and Eleventh Circuits have recognized that a prisoner may not pursue a damages action that, if successful, would necessarily imply the invalidity of any portion of his sentence.*

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* See *Montgomery* v. *Anderson*, 262 F.3d 641, 644 (7th Cir. 2001) ("Montgomery can achieve review of the [prison disciplinary] board's decision by concentrating on [the punishment of reduction in] his credit-earning class, so *Edwards* blocks use of § 1983 unless Montgomery prevails in the § 2254 proceedings."); *Evans* v. *McBride*, 94 F.3d 1062, 1063 (7th Cir. 1996) (recognizing that its analysis in *Viens* had "changed" in light of *Heck*), cert. denied, 519 U.S. 1131 (1997); see also *Uboh* v. *Reno*, 141 F.3d 1000, 1006 (11th Cir. 1998) ("[A] civil proceeding challenging the grounds on which the prosecution against Uboh had been commenced indirectly would implicate the question of Uboh's guilt; this type of parallel inquiry by way of a civil suit prior to the resolution of a criminal action based on the same set of events is precisely the quandary that *Heck* prohibits.").

Petitioner argues (Pet. 16 n.1) that the Seventh Circuit could not have intended to depart from *Viens* in *Montgomery* because it did not follow circuit rules applicable when a proposed panel opinion would overrule a prior decision of the court. But in light of the Seventh Circuit's earlier recognition that *Heck* had "changed" the approach used in *Viens*, see *Evans*, 94 F.3d at 1063, that court likely did not see the need to express-

Petitioner also relies (Pet. 13-15) on the Second Circuit's decision in *Peralta* v. *Vasquez*, 467 F.3d 98 (2006), cert. denied, 551 U.S. 1145 (2007). In *Peralta*, the court held that "a prisoner who was subject to a single disciplinary proceeding that gave rise to sanctions that affect both (a) the duration of his imprisonment and (b) the conditions of his confinement" may maintain a civil action "aimed solely at the latter sanctions" without first proceeding in habeas, if the prisoner "is willing to forgo once and for all any challenge to any sanctions that affect the duration of his confinement." *Id.* at 104 (emphasis omitted); see *id.* at 105 (concluding that judicial estoppel would apply to a prisoner "who was subject to mixed sanctions and who, having agreed to abandon forever his duration claim, was allowed to proceed separately with his conditions of confinement claim under § 1983").

Although the Second Circuit's approach in *Peralta* differs from the District of Columbia Circuit's approach in this case, the Court's review is nonetheless not warranted at this time. The conflict is limited and of recent vintage. The Second Circuit's holding has not been examined by the other courts of appeals, and this Court's review could benefit from additional consideration of the question by lower courts. Indeed, the Court denied review in *Peralta*, even though that decision was already at odds with the holdings of several circuits. See, *e.g.*, *Montgomery*, 262 F.3d at 644; *Gotcher* v. *Wood*, 122 F.3d 39 (9th Cir. 1997); *Sheldon* v. *Hundley*, 83 F.3d 231, 233-234 (8th Cir. 1996); see also 06-1307 Pet. 8-10, *Jones* v. *Peralta*. There is no reason for a different result here.

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ly overrule *Viens* in *Montgomery*. In any event, it is plain that, since *Viens*, the Seventh Circuit has adopted the exclusivity rule of *Heck* and *Edwards*. See *Post* v. *Gilmore*, 111 F.3d 556, 557 (1997).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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